No. 719

MAY 1 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. Concerning "Constructive Treason".

Conceding, by not claiming as it has taken pains to do with other serious matters raised in these cases, that the motion to free petitioner is not "too late", if he was convicted in violation of Article III Section 3 of the Constitution—the Treason clause—the Government attempts, by inaccuracy and misplaced emphasis, to mitigate the force of petitioner's argument with respect to "constructive treason".

It is simply not correct to say that the "substance of the argument" (Br. Opp. No. 719, p. 6) was heretofore presented to this Court. The petition for certiorari in No. 111, and the petitions for rehearing in No. 111-112, made no reference at all to "constructive treason", the attempt to treat petitioner's present submission as a "repetition" could only have been made by one who did not comprehend the meaning of "constructive treason" and did not understand why it was rejected by the framers of the Constitution. This misapprehension is incidentally shown by the

fact, for example, that as heretofore presented in this case, the argument with respect to the "Treason clause" has necessitated reference to the two-witness requirement or the assumption that the Soviet Union was an enemy. However the showing now presented is that the trial was converted into one for "constructive treason", and in consequence, neither two nor one hundred and two witnesses would have validated a conviction. Constructive treason was the area for the operation of the "newfangled and artificial treasons" of which Madison (The Federalist, No. 43) was pleased to say that the convention had "opposed a barrier to this peculiar danger".

The issue warranting review is not that merely the "charge" against petitioner (Br. Opp. 5) was one of constructive treason, nor merely that he was "penalized" or "punished" for disloyalty (Br. Opp. 2, 6). Review is claimed on the ground that that is what he was *tried* for. No prosecutor is likely to violate the proscription against "constructive treason" by an indictment invalid on its face. The rejection of "constructive treason" in 1789 will remain meaningful and enforceable only if prosecution by indirection is recognized when it occurs, and checked by the Court. The question warrants review in this case: for can it be imagined how much further a trial can go, in becoming in substance and effect one for "constructive treason", than this one? The petition is quite explicit (Pet. No. 719, pp. 15-22) that it was much more than the mere allusion to "treason" and "traitors" that made the trial a constructive treason trial, and so the argument at Br. Opp. 6-7 is wholly misplaced.

A collateral inaccuracy, reflecting the lack of consideration given to the matter, is the ultimate statement (Br. Opp. 7) that "petitioner was tried * * * for acts of espionage". Such acts were neither alleged nor proved even incidentally; it is by virtue of the very nature of the *conspiracy* aura that the constructive treason claim gains additional force.

2. Concerning the fraudulent characterization as "atom spy".

The Government attempts to minimize the conduct complained of by referring to it as "an aspect of a more general complaint" (Br. 7) and describing petitioner as one who "made no request for change of venue or adjournment of the trial" (Br. 2). But this cannot conceal that which is not denied; that petitioner had "no pre-trial opportunity to complain" (Pet. p. 11) of the falseness of the characterization, because of a misleading bill of particulars and indictment (See R. 184 quoting earlier Court of Appeals opinion).

The discussion of the merits (Br. Opp. 7-9) is indistinguishable from the sort of argument that might be presented to support or attack a *post-hearing* determination. But there was no hearing here: the issue on which review is now sought is whether enough appears in the moving papers to warrant a *hearing*. To argue that prosecution statements (not attempted to be otherwise defended) were "relatively few" (Br. Opp. p. 7); that newspapers made an "assumption" or contained "confusion" or used "shorthand" (Br. 8) is not appropriate to support a finding that the files, etc., "conclusively show that the petitioner is entitled to no relief" (Br. 6).

It is noteworthy that the Court of Appeals' treatment of this point, as being "in essence" the same as that presented on the former appeal (Pet. No. 719, pp. 28-29), is now abandoned by the Government in this Court. And the alternate arguments employed to support the decision below, go but to reemphasize the need for a hearing, and the propriety of review by this Court as to the right to hearing on an initial showing such as here made. For, contrary to the opposition brief, there were direct statements of the prosecutor quoted in the record (R. 185). For example, in a news story describing this petitioner as "another alleged member of the Russian atom spy ring" in its lead sentence,

Mr. Saypol is quoted as saying: "Sobell had many dealings with Rosenberg in the conspiracy to supply Russia with atomic secrets" (Exh. VIII-A-19). Another story, calling petitioner an "Atom Spy" in bold black headlines, shows that the source of the reference must have been a prosecution prompting: "Informed sources indicated that the F.B.I. is on the trail of at least four other atom spies" (Exh. VIII-C-5). Other evidence indicative of the "feeding" appears in a later statement: "It is believed that he was recruited into the Russian atom spy ring by Rosenberg (Exh. VIII-A-25).

Even if there were not such direct evidence of prosecutor quotation and prosecutor "leaking", the requirements of due process, which impose a duty not to suppress evidence favorable to an accused, would impose a duty, in the circumstances of this case, upon the prosecutor to correct by forthright disavowal the false and prejudicial impression created as a result of his press statements. Cf. *Shepherd* v. *Florida*, 341 U. S. 50. The apologetic references to "confusion" and "shorthand" now made (Br. opp. 8) may be given a short answer: they come *too late* to remedy the prejudice to petitioner. Why was it not admitted before the trial that the newspapers were in "confusion" and that it was not seriously believed, or ever expected to be proved, that petitioner was an "Atom Spy"?

3. Concerning the Court of Appeals' misconception of the state of the record as to the Perl incident.

It is most incorrect to say that the "remainder of the petition is in substance an incorporation of points made by petitioner's co-defendants" (Br. Opp. p. 9). The Government has overlooked pages 32 to 34 of the petition. This factual inaccuracy permits the Government to avoid response to a simple, direct question: how could the petitioner's attorney have "concluded" that Saypol's "reprehensible" statement did his client no harm when he *simply did not know about it at the time it was made* (R. 207-8).

Petitioner consents to the submission of a supplemental opposition brief by the Government, so that it may respond to this point which has now been overlooked in both Briefs in Opposition to Certiorari, if it desires to do so, and if it can.

Respectfully submitted,

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